LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CRIMINAL COURT OF BALTIMORE,
STATE OF MARYLAND

BRIEF FOR THE APPELLANT

BENJAMIN LIPSITZ,
1525 Mathieson Building,
Baltimore 2, Maryland,
Counsel for Appellant

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Ordinance Involved	2
Questions Presented	3
Statement	4
Summary of Argument	9
Argument:	
1. A health officer of Baltimore City cannot lawfully enter and inspect a private home without a search warrant if the owner or occupier objects. The provision of the Baltimore City Health Code (Article 12, Section 120) purporting to permit invasion of appellant's home without a warrant by a health officer having cause to suspect the existence of a nuisance in the house is void for repugnance to the prohibition against unreasonable searches of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The proposed examination of appellant's residence, sought to be made without a warrant under authority of the ordinance, was an unwarranted attempt to carry out an arbitrary, unjustifiable and unlawful invasion of appellant's privacy, which he rightfully resisted by refusing entry to the health officer in the absence of a warrant	11
A. Whether measured against the guaranties of the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment, the intended search of appellant's house without a warrant was unlawful	12

PAGE

B. The attempted search of appellant's dwelling without a warrant was in itself unreasonable and infringed his "right to be let alone" 14

C. Section 120 imposes criminal punishment for appellant's mere refusal, on constitutional grounds, to admit a health officer without a warrant and is therefore invalid 15

D. The intended examination of appellant's house without a warrant was a search connected with a criminal prosecution, but whether or not it is so considered, it was still such a search as falls within the scope and prohibition of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment 19

E. The proposed search of appellant's home without a warrant was unreasonable and cannot be justified on any ground 25

2. Appellant seeks nothing more than simple procedural due process. The constitutional guaranties upon which he relies assure him that minimal protection 28

CONCLUSION 29

TABLE OF CITATIONS

Cases

Adamson v. California, 332 U.S. 46 12n

Agnello v. United States, 269 U.S. 20 14, 26

Application of Certain Chinese Family Benevolent and District Associations, D.C., N.D. California, S.D., 19 F.R.D. 97 22n

Brack v. State, 187 Md. 542. 5n

Christie v. Leachinsky, 1 All E.R. 567 29n

Davis v. United States, 328 U.S. 582 26

PAGE

District of Columbia v. Little, 85 U.S. App. D.C. 242 10, 15, 15n, 16, 16n, 18, 20, 20n, 22, 28, 28n

District of Columbia v. Little, 339 U.S. 1 9, 15, 16, 16n, 17, 18, 19, 22

Federal Communications Commission v. Cohn, D.C., S.D. New York, 154 F. Supp. 899 22n

Federal Trade Commission v. American Tobacco Company, 264 U.S. 298 10, 22

Federal Trade Commission v. Tuttle, 2 Cir., 244 F. 2d 605 22n

Givner v. State, 210 Md. 484 1n, 8n, 15n, 16n, 20, 20n, 25, 27, 28, 28n

Harriman v. Interstate Commerce Commission, 211 U.S. 407 22

Harris v. United States, 331 U.S. 145 26, 29n

Johnson v. United States, 333 U.S. 10 25, 26

Jones v. United States, 357 U.S. 493, 78 S. Ct. 1253, 2 L. ed. 2d 1514 26

Little v. District of Columbia, (D.C. Mun. App.) 62 A. 2d 874 15, 15n, 16n

McCulloch v. Maryland, 4 Wheat. 316 23

McDonald v. United States, 335 U.S. 451 26

Miller v. United States, 357 U.S. 301, 78 S. Ct. 1190, 2 L. ed. 2d 1332 14, 26

Olmstead v. United States, 277 U.S. 438 14

Palko v. Connecticut, 302 U.S. 319 12n, 13

Richards v. City of Columbia, 227 S.C. 538 16n

State v. Price, 168 Ohio St. 123, 151 N.E. 2d 523 16n

Wolf v. Colorado, 338 U.S. 25 9, 12n, 13, 16n, 19, 25, 26

Constitutional Provisions, Statutes, Ordinances

Annotated Code of Maryland (1951 Edition), Article 5, Section 94 5n

Annotated Code of Maryland (1957), Article 5, Section 21 2n

PAGE

Annotated Code of Maryland (1957 Supplement), Article 5, Section 30 ..... 5n

Baltimore City Code (1950), Article 12:
Sections 106-108 24
Section 107 24
Section 112 24
Sections 112-120 24
Section 120 ..... 3, 11, 18, 23n, 28n
Section 197 ..... 27n
Section 208 27

Charter and Public Local Laws of Baltimore City (Flack's 1949 Edition), Section 6, paragraphs (1), (5), (11) and (24) 4n

Charter and Public Local Laws of Baltimore City (Flack's 1949 Edition), Section 411 ..... 5n

Fourth Amendment to the Constitution of the United States (1 U.S.C., 1952 Edition, XLIV) 2

Fourteenth Amendment to the Constitution of the United States (1 U.S.C., 1952 Edition, XLV) 2, 3

Laws of Maryland, 1953, Chapter 676 ..... 5n

Laws of Maryland, 1957, Chapter 399, Section 4 ..... 5n

United States Code, Title 28, Section 1257(2) 1

Miscellaneous

Flack, *The Adoption of the Fourteenth Amendment* (1908) 349 ..... 12n

63 Harvard Law Review (1949) 350 23

40 *Report and Official Opinions of the Attorney General of Maryland* (1955) 641 ..... 5n

Tudor, *Life of James Otis of Massachusetts* (1823) 78, 79 ..... 28n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 278

AARON D. FRANK,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CRIMINAL COURT OF BALTIMORE, STATE OF MARYLAND

BRIEF FOR THE APPELLANT

OPINIONS BELOW

No opinion was delivered in any of the courts below.[1]

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. 1257(2), since the validity of a state statute, in this instance an ordinance of the Mayor and City Council of Baltimore, Maryland, is drawn in question on grounds of its repugnancy, both on its face and as construed and applied, to the Fourth, and to the Due Process Clause of the Fourteenth, Amend-

[1] But see *Givner v. State of Maryland*, 210 Md. 484, and note 6, *infra*, page 8.

ments to the Constitution of the United States and the decision below is in favor of the validity of the ordinance. The judgment and sentence of the Criminal Court of Baltimore, which are sought to be reviewed, were entered on March 17, 1958 (R. 2, 26, 42). On March 22, 1958, appellant applied to the Court of Appeals of Maryland, the state's court of last resort, for certiorari[2] to review that judgment (R. 43, 44). That court denied certiorari on April 25, 1958 (R. 43). The notice of appeal to this Court was filed in the Criminal Court of Baltimore on June 16, 1958 (R. 2). The transcript of record and jurisdictional statement were filed in this Court on August 15, 1958. This Court noted probable jurisdiction on October 20, 1958 (R. 45).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Fourth Amendment to the Constitution of the United States provides (1 U.S.C., 1952 Edition, XLIV):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides, in part (1 U.S.C., 1952 Edition, XLV):

---

[2] His petition was necessarily addressed to that court's discretionary jurisdiction. Annotated Code of Maryland (1957), Article 5, Section 21. The instant case originated before one of the station house magistrates of Baltimore City (R. 1-3) and was heard in the Criminal Court of Baltimore on appeal from the magistrate's decision (R. 4). Appellant had no further appeal, or means of review as of right, from his conviction by the Criminal Court of Baltimore. See note 4, *infra*, page 5.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Baltimore City Code (1950 Edition), Article 12, Section 120, provided on the dates involved in this case and now provides (Page 56 (fol. 106) of pamphlet opposite R. 36):

"120. Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

QUESTIONS PRESENTED

1. Can a health officer of Baltimore City enter and inspect a private home without a search warrant if the owner or occupier objects?

2. Did the Criminal Court of Baltimore (Part II) err in sustaining the validity of Baltimore City Code (1950 Edition), Article 12, Section 120, and of the proposed inspection of appellant's private dwelling house for an alleged nuisance consisting of alleged rat infestation, undue trash and debris, sought to be made thereunder in the day time without a search warrant by a sanitarian of the Baltimore City Health Department, against appellant's objections that said Section 120 was repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States and subjected him to, and the proposed inspection constituted, an unreasonable and illegal search of his house, a wrongful

trespass upon his property and a wrongful taking thereof, all without due process of law and in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States?

3. Did the Criminal Court of Baltimore (Part II) err in denying appellant's "Motion to Dismiss" and his "Motion for a Verdict of 'Not Guilty'" and in convicting him of violating said Section 120?

STATEMENT

The Mayor and City Council of Baltimore, exercising within the limits of that city all the police power of the State of Maryland (R. 40),[3] enacted an ordinance empowering its health officers who shall have cause to suspect that a nuisance exists in any house to demand entry therein in the day time and providing that an owner or occupier who shall refuse or delay to open his house and admit a free examination shall forfeit and pay for every such refusal or delay the sum of twenty dollars (Page 56 (fol. 106) of pamphlet opposite R. 36). Appellant refused to open his house and admit an examination thereof by a Health Department sanitarian who demanded entry (R. 9) in the day time, without a search warrant (R. 19), to inspect for an alleged suspected nuisance (R. 9, 14, 17). After trials in the appropriate state courts of Maryland, appellant was finally convicted of violating the ordinance (R. 1, 26, 43) and he appeals, urging, as he did below, that his conviction

---

[3] Charter and Public Local Laws of Baltimore City (Flack's 1949 Edition), Section 6, paragraph (24). See also, for further delegations to the City of Baltimore of powers pertinent to the instant cause, paragraphs (1) (power to regulate use and maintenance of buildings and structures of every kind), (5) (power to enter the land or possessions of any person to carry out the powers enumerated in Section 6) and (11) (power to preserve the public health and to prevent and remove nuisances) (R. 38-39).

resulted from his rightful refusal to submit to an unreasonable and illegal search of his home, sought to be made under the ordinance in violation of the Fourth Amendment and without that due process of law assured him by the Fourteenth Amendment to the Constitution of the United States.

Testimony given in the Criminal Court of Baltimore (at appellant's trial[4] on appeal from his conviction by the police magistrate before whom the prosecution was initiated) established the following principal facts:

On February 27, 1958 (R. 6), in the day time, Sanitarian Gentry, an officer of the Bureau of Rodent Control of the Baltimore City Health Department (R. 12), acting on a complaint of rats in the basement of a neighboring house (R. 6, 7, 12), went to appellant's private dwelling house in 4335 Reisterstown Road in the City of Baltimore, Maryland to make an inspection of the premises (R. 6, 7, 9, 11, 20). The sanitarian did not have a search warrant (R. 19).

Appellant's house is a detached frame structure, situated on a lot having a frontage of fifty feet and a depth of one hundred thirty-seven feet (R. 15; and see photographs, State's unnumbered exhibits, opposite R. 29-35). The complaining neighbor resided in 4319 Reisterstown Road, about eight houses, or approximately three hundred feet, removed from appellant's house (R. 13).

---

[4] The trial was *de novo*, in accordance with the local practice. The Criminal Court of Baltimore, regularly a *nisi prius* tribunal, sat here in the exercise of its special, appellate jurisdiction to hear appeals from judgments in criminal causes determined by the several justices of the peace assigned to police stations in Baltimore City. Charter and Public Local Laws of Baltimore City (1949 Edition), Section 411; Laws of Maryland, 1953, Chapter 676; Annotated Code of Maryland (1951 Edition), Article 5, Section 94; 40 Opinions of the Attorney General of Maryland (1955) 641; Laws of Maryland, 1957, Chapter 399, Section 4; Annotated Code of Maryland (1957 Supplement), Article 5, Section 30; *Brack v. State*, 187 Md. 542.

As a prelude to his examination, the sanitarian knocked on the door of appellant's house, but got no response. He then proceeded to inspect the outside of the premises (R. 7). After examining the yard and the exterior of the house (R. 7, 8) and, *inter alia*, noting that "The condition of the house was an extreme state of decay" (R. 9) and observing "debris and trash" (R. 9), and "a pile, later identified as rodent feces mixed with straw and trash and debris to approximately half a ton" (R. 9) in the yard, the sanitarian felt that he had cause to suspect the existence of a nuisance, consisting of rat infestation, trash and undue debris, *inside* appellant's house (R. 1, 3, 5, 6, 9, 13, 17, 19). He did not see any rats on the premises (R. 18), nor did he identify what species of rodent had deposited the feces (R. 9, 16, 17), although he received information, while on the premises, which, he testified, "led me to believe it was rodent feces, probably chinchilla. The defendant told me (fol. 16) he had been raising chinchillas but some children had stolen them" (R. 9). He did not observe the interior of the house (R. 11, 12).

While the sanitarian was engaged in his outside examination, appellant emerged from his house and spoke with the health officer in the yard (R. 9, 10, 19). He asked what the sanitarian was doing on the property (R. 9). The sanitarian identified himself, informed appellant of his suspicions and demanded entry to the house to inspect the basement area for rats (R. 9, 10). Appellant refused to admit the sanitarian (R. 9) without a warrant, telling him that "'you will have to get a search warrant if you want to get in this house'" (R. 19). The sanitarian did not enter the house (R. 11, 12, 13).

On the next day, February 28, 1958, Sanitarian Gentry returned to appellant's house, accompanied by two police

officers (R. 10, 11, 21) (He testified that he "wanted some witnesses" (R. 21).), but did not find anyone at home (R. 11, 21). He inspected the outside of the premises again (R. 11, 21). He did not observe the interior of the house (R. 11, 21). He then appeared before Magistrate Levin, one of the police station magistrates of Baltimore City, and swore out a warrant for appellant's arrest (R. 22) for violation of Baltimore City Code (1950 Edition), Article 12, Section 120, in that a nuisance, consisting of rat infestation, undue trash and debris, was suspected in appellant's house and appellant had refused him entry thereto on February 27, 1958 (R. 1, 3, 5, 11, 17, 24, 25). On March 5, 1958, appellant was arrested, while sitting in his automobile parked on the street, by a police officer acting under the warrant (R. 24).

On March 6, 1958, appellant was tried on the charge laid in the warrant before Magistrate Rogers, one of the justices of the peace of Baltimore City assigned to the police stations thereof, in Northern District Police Station Magistrate's Court. The magistrate found him guilty of violating Section 120 and imposed a fine of $20.00 and costs (R. 1-3). Appellant forthwith, on the same day, entered an appeal (R. 4).

On March 7, 1958, while the appeal was pending, Sanitarian Gentry again went to appellant's house and took pictures of the outside of the house and of the grounds (R. 8). Eight photographs taken by him on that day were introduced in evidence by the State during appellant's trial, on his appeal, in the Criminal Court of Baltimore (Part II) on March 17, 1958 (State's unnumbered exhibits; R. 8, 29-35).

In all the courts below, appellant attacked both Section 120, on which the prosecution rested, and the inspection

sought to be made thereunder on the grounds that the Section subjected him to, and the proposed inspection constituted, an unreasonable and unlawful search of his house, as well as a wrongful trespass upon and taking of his property, all without due process of law and in violation of his constitutional rights under the Fourth and Fourteenth Amendments (R. 2, 5, 6, 23, 26, 27-28, 40-41). In the Criminal Court of Baltimore, before pleading to the charge[5] against him, he moved to dismiss it on constitutional grounds (R. 5, 27-28). At the end of the State's case he moved for a verdict of "not guilty", chiefly on constitutional grounds (R. 23, 40-41). At the close of the entire case he renewed both motions. But the court rejected his contentions, denied his several motions, entered a verdict of guilty and imposed a fine of $20.00 and costs (R. 2, 26, 28, 41, 42). From that judgment and sentence this appeal is brought here.[6]

---

[5] There was no indictment nor any information filed in the Criminal Court of Baltimore (R. 5). Appellant was simply tried on the papers transmitted by the magistrate, as is the practice in Baltimore City. He makes no issue of this procedure.

[6] While no opinions were delivered below, it is noteworthy that the Court of Appeals of Maryland, the state's highest tribunal, had, in a quite similar earlier case, carefully considered the specific questions here involved, *i.e.*, the validity of Section 120 and the legality of an inspection sought to be made thereunder by a Health Department officer without a warrant as against the Fourth and Fourteenth Amendments, and had fully expressed itself in support of the validity and constitutionality of the ordinance. *Givner v. State of Maryland* (1956), 210 Md. 484.

In *Givner*, representatives of the Commissioner of Health, the Building Inspection Engineer and the Fire Department, an electrical inspector and a uniformed policeman requested permission to enter defendant-appellant's apartment to make inspections and were refused entry. Defendant was then indicted and convicted for violating the provisions of the Baltimore City Code, the first count charged violation of Article 12, Section 120 of that Code.

The rule of *Givner* was of course binding on the trial magistrate and on the Criminal Court of Baltimore.

SUMMARY OF ARGUMENT

A health officer of Baltimore City cannot lawfully enter and inspect a private home for a suspected nuisance without a search warrant if the owner or occupier objects. The Baltimore City Health Code provision purporting to permit such arbitrary invasion of the right of privacy infringes the guaranties of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment and is void.

Whether or not the Fourth Amendment directly affects activities of state health officers, its essential protection against invasion of the individual's privacy is enforceable through the Due Process Clause to invalidate such incursions into privacy by the state. *Wolf v. Colorado*, 338 U.S. 25. Accordingly, the intended search of appellant's private dwelling without a warrant invaded his "right to be let alone", offended constitutional guaranties and was unlawful.

The Health Code provision which purports to permit such a search imposes criminal punishment on appellant for nothing more than mere refusal to admit a health officer to inspect the sanitary conditions of his house, accompanied by remonstrances on substantial constitutional grounds. It invades the right of privacy in the home and is therefore invalid. *District of Columbia v. Little*, 339 U.S. 1.

The argument that the intended inspection was exempt from the effect of constitutional safeguards because not conducted in connection with criminal prosecutions or enforcement of penalties is entirely untenable. The ultimate outcome of proceedings initiated by such inspection may well be criminal punishment and evidence obtained during the inspection may be used to secure criminal convictions for violation of Health Code provisions. Even if the proposed inspection is treated as one connected with civil,

rather than criminal, proceedings, it is still such a search as falls within the scope and prohibitions of the protective Amendments. The argument that the Amendments require an officer who is searching for evidence of crime to have a search warrant, but permit one who is just searching to do so without a warrant is absurd. The common law right to protection of one's privacy preceded the Fourth Amendment and is not related to crime or suspicion of crime. A man suspected of crime certainly has no better right to protection in his home from search without a warrant than a man who is not suspected of crime. *District of Columbia v. Little*, 85 App. D.C. 242. And the Fourth Amendment has application to civil searches as well. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298.

The intended search of appellant's home without a warrant was unreasonable and cannot be justified. There was no emergency relieving from the necessity to obtain a search warrant. The health officer had ample time to apply for a warrant. Protection of the public health does not require any greater encroachment upon civil liberty than does enforcement of the criminal laws or fire prevention laws, neither of which envision, or would in the circumstances of the instant case condone, arbitrary invasion of a private home without a warrant. And the Baltimore City Health Code itself provides for obtention of warrants in connection with conditions (contagious diseases) much more dangerous to public health than the condition (rat infestation) here sought to be made the basis for search without a warrant.

The ordinance for violation of which appellant was convicted permits a health enforcement officer himself to determine, without intervention of a judicial officer, whether a search should be made, and to do so on mere suspicion

alone. It denies appellant that minimal procedural due process which constitutional safeguards secure to him and is therefore void. The lower court erred in failing to recognize the invalidity of the ordinance and in convicting appellant for his rightful refusal to submit to the unlawful search which it condoned.

ARGUMENT

1. A HEALTH OFFICER OF BALTIMORE CITY CANNOT LAWFULLY ENTER AND INSPECT A PRIVATE HOME WITHOUT A SEARCH WARRANT IF THE OWNER OR OCCUPIER OBJECTS. THE PROVISION OF THE BALTIMORE CITY HEALTH CODE (ARTICLE 12, SECTION 120) PURPORTING TO PERMIT INVASION OF APPELLANT'S HOME WITHOUT A WARRANT BY A HEALTH OFFICER HAVING CAUSE TO SUSPECT EXISTENCE OF A NUISANCE IN THE HOUSE IS VOID FOR REPUGNANCE TO THE PROHIBITION AGAINST UNREASONABLE SEARCHES OF THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. THE PROPOSED EXAMINATION OF APPELLANT'S RESIDENCE, SOUGHT TO BE MADE WITHOUT A WARRANT UNDER AUTHORITY OF THE ORDINANCE, WAS AN UNWARRANTED ATTEMPT TO CARRY OUT AN ARBITRARY, UNJUSTIFIABLE AND UNLAWFUL INVASION OF APPELLANT'S PRIVACY, WHICH HE RIGHTFULLY RESISTED BY REFUSING ENTRY TO THE HEALTH OFFICER IN THE ABSENCE OF A SEARCH WARRANT.

This cause arises from impingement of an attempted exercise by an agency of the State of its police power respecting protection of the public health upon one of the fundamental tenets of individual liberty, protected by federal constitutional guaranties, the right to be secure in the privacy of one's home from arbitrary intrusion by government officials without search or other proper warrants. Appellant submits that the health code provision (Baltimore City Code (1950), Article 12, Section 120), upon which his prosecution rested, permits, and the proposed search

(inspection) of his house sought to be made thereunder represented, just such an arbitrary, unwarranted and unlawful invasion of his privacy.

A. Whether Measured Against the Guaranties of the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment, the Intended Search of Appellant's House Without a Warrant Was Unlawful.

Aside from the question whether the Fourth Amendment should be given effect against the State in the circumstances of the instant cause,[7] it now seems settled that protection

---

[7] While the issue may by many be considered closed, respectable opinion exists to the contrary. See dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U.S. 46, 68, and opinion in *Wolf v. Colorado*, 338 U.S. 25, of Mr. Justice Black (338 U.S. 25, 40), concurring, and Mr. Justice Rutledge (338 U.S. 25, 47), dissenting. Good authority supports the view "that Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification: "1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States. . . ." See Flack, *The Adoption of the Fourteenth Amendment* (1908) 94, referred to in dissent of Mr. Justice Black in *Adamson v. California*, 332 U.S. 46, 72n. And see also the comprehensive Appendix to the dissenting opinion collecting pertinent excerpts from Congressional and other records of proceedings leading to promulgation and adoption of the Amendment. *Id.*, at pages 92-123. The dissent urges that, on the question of application *vel non* of the Bill of Rights to the States through the Fourteenth Amendment, this Court has consistently avoided employing the respected practice of interpreting legislative enactments in accordance with the intent of their framers and has ignored the clear evidence of that intent present in the sources referred to in the Appendix to the dissenting opinion, 332 U.S. 46, 72, 92-123.

Appellant suggests that the instant case is an appropriate one in which to implement the doctrine of the dissent and, at the same time, to further the principle that the Due Process Clause "exacts from the States for the lowliest and most outcast all that is 'implicit in the concept of ordered liberty'", announced in *Palko v. Connecticut*, 302 U.S. 319, and applied to the protection "which is at the core of the Fourth Amendment" in *Wolf v. Colorado*, 338 U.S. 25, by directly applying the prohibition of the Fourth Amendment to invalidate the health code provision and intended search here in issue.

of the security of one's privacy against arbitrary intrusion by government officers is among those guaranties basic to our free society, implicit in "the concept of ordered liberty", enforceable against the states through the Due Process Clause. *Wolf v. Colorado*, 338 U.S. 25; *Palko v. Connecticut*, 302 U.S. 319.

In *Wolf v. Colorado*, 338 U.S. 25, 27, 28 (1949), in dealing with the question whether a conviction in a State court violated the Due Process Clause because evidence admitted at the trial would have been excluded in a federal prosecution because obtained in a manner offending the Fourth Amendment, this Court said:

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples.
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

If one were to read "health officers" in the place of "police", the Court's statement would seem to apply with no less vigor to the instant case. Certainly the search here was sought to be made solely on the authority and convenience[8]

---

[8] The sanitarian testified on this point as follows (R. 20):

"Q. . . . Could you not just as well have made your inspection one hour or two hours later than at the time you demanded entry?

of the sanitarian and was affirmatively sanctioned by the State in the ordinance.

B. THE ATTEMPTED SEARCH OF APPELLANT'S DWELLING WITHOUT A WARRANT WAS IN ITSELF UNREASONABLE AND INFRINGED HIS "RIGHT TO BE LET ALONE".

This Court has said that, "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein". *Agnello v. United States*, 269 U.S. 20, 32. And, "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws". *Id.*

More than two decades ago, in discussing the efficacy of the Fourth and Fifth Amendments to protect against wiretapping by federal officers, Mr. Justice Brandeis, dissenting in *Olmstead v. United States* (1928), 277 U.S. 438, 478, said:

> "The protection guaranteed by the amendments is is much broader in scope. . . . They conferred, as against the government, the right to be let alone — the most comprehensive of the rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

As recently as *Miller v. United States*, 357 U.S. 301, 78 S. Ct. 1190, 1195, 2 L. ed. 2d 1332, 1337 (decided June 23, 1958), this Court saw fit to emphasize the sanctity of "the precious interest of privacy summed up in the ancient adage that a man's house is his castle", quoting the remarks on that principle attributed to the Earl of Chatham:

A. I could not. I had two students I had to release at three o'clock. I have to be in the office at three thirty every day to take care of my reports."

> "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!"

Appellant was well within his constitutional rights in refusing admittance to his home to the health officer who had no warrant. He rightfully refused to comply with an ordinance purporting to authorize an unlawful search of his house. *Little v. District of Columbia* (D.C. Mun. App.), 62 A. 2d 874; *District of Columbia v. Little*, 85 U.S. App. D.C. 242, 13 A.L.R. 2d 954 (1949), affirmed on other grounds 339 U.S. 1. The instant cause requires resolution of constitutional issues quite similar to those presented to this Court in *Little*.

C. Section 120 Imposes Criminal Punishment for Appellant's Mere Refusal, on Constitutional Grounds, to Admit a Health Officer Without a Warrant and is Therefore Invalid.

Little appears to be the only case heretofore brought to this Court directly presenting the particular conflict here involved between the essential safeguards against unreasonable searches afforded the individual by federal constitutional guaranties and the necessary exercise of its police power by the government (of the state or other political sub-division) to protect the public health.[9] In

[9] Elsewhere, four jurisdictions appear to have treated, or discussed, the same problem, or a similar one arising under state constitutional provisions. These are the District of Columbia (*Little v. District of Columbia*, 64 A. 2d 874 (1948) and *District of Columbia v. Little*, 85 App. D.C. 242 (1949), holding that the Fourth Amendment prohibits entry of federal health officer without a warrant against occupant's consent); Maryland (*Givner v. State*, 210 Md. 484 (1956), holding that neither the Fourth nor the Fourteenth Amendment in-

Little, 339 U.S. 1, the defendant-respondent had been convicted in the trial court of interference with a health officer of the District of Columbia by locking the door to her home, refusing the officer admittance and protesting her constitutional right to be secure from his search or inspection in the absence of a warrant.[10] Two intermediate reviewing courts[11] found the conviction erroneous, on the constitutional ground that "the Fourth Amendment's prohibition against unreasonable searches and seizures forbade the health officer to enter respondent's private home without a search warrant" (339 U.S. 1, 2) and this Court granted certiorari upon application of the District.

---

validates such entries by state health officers); South Carolina (*Richards v. City of Columbia* (1955), 227 S.C. 538, 556, containing a dictum only stating that there is doubt whether constitutional guaranties against unreasonable searches are applicable to entries by officers enforcing housing code); and Ohio (*State v. Price* (1958), 168 Ohio St. 123, 151 N.E. 2d 523, holding that such entries under a housing code do not offend the pertinent provision of the Ohio constitution, which is said to be comparable to the Fourth Amendment). The opinion of the Ohio court expressly excludes consideration of any federal constitutional question. 151 N.E. 2d 523, 525. The case does not appear to add anything to the existing state of the law, but seems simply to adopt the *Givner* result as being the most worthy of support. The Ohio opinion does not, however, consider the Fourteenth Amendment's effect on the problem. It should be noted that both the Maryland court in *Givner* (210 Md. 484, 499, 500) and the Ohio court in *Price* (151 N.E. 2d 523, 528-529) seem to have been impressed and influenced by the fact that this Court avoided deciding the constitutional question in *Little*.

[10] While *Little* arose directly under the Fourth Amendment, that dissimilarity between it and the instant case would seem to be obviated by the holding in *Wolf v. Colorado*, 338 U.S. 25, that the Fourth Amendment's prohibition against unreasonable searches, or, at least, a commensurate protection, "which is at the core of the Fourth Amendment" (338 U.S. 25, 27, 28) and hence, by a sensible analogy, equivalent to that prohibition and comparable in scope, is enforceable against the States.

[11] The Municipal Court of Appeals for the District of Columbia (*Little v. District of Columbia*, 62 A. 2d 874) and the U. S. Court of Appeals for the District of Columbia Circuit (*District of Columbia v. Little*, 85 U.S. App. D.C. 242).

Of course, in *Little*, this Court declined to decide the proffered constitutional questions, applying instead its policy to dispose of a cause on non-constitutional grounds where the record permits. It disposed of the case by determining an interpretative question, with which the lower courts had not dealt, and holding that respondent's statements and actions did not constitute "interference" with the health officer within the meaning of the pertinent statutes and regulations of the District. 339 U.S. 1, 4. But, in doing so, this Court condemned enactments which, like Section 120 in the instant cause, seek to impose criminal penalties for mere refusal, on constitutional grounds, to submit to an examination of one's home by a health officer without a warrant. This Court clearly and succinctly expressed that sentiment in its statement of the reason for the ruling which it made on interpretative question (339 U.S. 1, 7):

> "The right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here."

What "respondent did here", in *Little*, was to tell "the health officer, who had no search warrant, not to enter her home to inspect its sanitary condition; she had also refused to unlock her door" (339 U.S. 1, 2), a "mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds" (339 U.S. 1, 5-6). And her activities in that regard could scarcely be considered censurable; they were, indeed, necessary, for "Had the respondent not objected to the officer's entry of her house without a search warrant, she might thereby have waived her constitutional objections" (339 U.S. 1, 7).

The logical inference would seem to be that, absent the saving construction which this Court placed upon the provisions of the District regulation prohibiting interference with its health officers, that regulations would run counter to the Fourth Amendment, as condoning unreasonable searches, and would be invalid.

If the District regulation examined in *Little* was objectionable unless so construed as to avoid imposition of criminal punishment for mere refusal to submit to a health officer's inspection in the absence of a warrant, how much more reprehensible is the instant Baltimore City health code provision, which, by its express terms, proposes to do exactly that which this Court condemned by its reasoning in *Little!* There is neither need nor room for any "interpretative question" in order to reach the plain and patent meaning of the clear and explicit language of Section 120. That section, without any doubt, imposes a "criminal punishment" (339 U.S. 1, 7), in the form of a forfeit or fine of twenty dollars, for doing "nothing more than respondent did" (*Id.*) in *Little*, indeed, for doing less, since one need not even refuse to open his house, as defendant-respondent did in *Little*, but only "*delay* to open the same and admit a free examination" (Page 56 (fol. 106) of pamphlet opposite R. 36; emphasis supplied) to be subject to punishment under Section 120.

Existence of the ordinance poses no small dilemma for the conscientious citizen since, under its terms, reliance on constitutional objections to a proposed search without a warrant, which might be waived if not made (*Little Case*, 339 U.S. 1, 7), might also very readily result in the objector's prompt arrest, as was the immediate sequel, in the instant cause, to appellant's refusal to comply with the ordinance (R. 11, 22, 24-26). Let a householder of Baltimore City but have the temerity to answer a health officer's

demand for entry with a request first to see a search warrant and he risks being taken up by the police and subjected to prosecution in the state's criminal courts, as was appellant. If the forfeit or fine fixed by the ordinance should not be paid forthwith, then one foolhardy enough to oppose the bar of the United States Constitution to a health officer's demand for entry, based only on his own determination that cause exists to suspect a nuisance, might very well find himself exposed to imprisonment for his pains (R. 3)!

To open an area of civil liberty as broad, sensitive, precious and important as "the right to be let alone" in the privacy of the home itself to invasion in the sole discretion of government enforcement officials, whose activities are curbed only by the *subjective* requirement that they first find that cause exists for mere *suspicion* of a nuisance (presumably limited to nuisances cognizable under the health code) is to subvert not only those concepts of human rights which are said to be "enshrined in the history and basic constitutional documents of English-speaking peoples" (*Wolf v. Colorado*, 338 U.S. 25, 27, 28), but every reasonable notion of fair play or due process as well. This Court's reasoning in *Little*, evidenced by the language quoted (*supra*, page 17), should alone suffice to resolve the constitutional issues in this case in appellant's favor.

D. The Intended Examination of Appellant's Home Without a Warrant was a Search Connected With a Criminal Prosecution, but Whether or not it is so Considered, it was Still Such a Search as Falls Within the Scope and Prohibition of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment.

A principal reliance of proponents of health code inspections without warrants seems to be their contention that

such examinations are exempt from the effect of constitutional guaranties because not conducted in connection with criminal prosecutions or enforcement of penalties. Accordingly, a chief basis of the decision in *Givner*, on which the State relies heavily in the instant case, seems to have been the Maryland court's feeling that the proposed inspection there was not "a search for evidence to prove guilt of a crime" (210 Md. 484, 504),[12] which would admittedly have been abhorrent under either the Fourteenth Amendment or Maryland law, and that the inspection hence was beyond the pale of the protective Amendment. Similar reasoning, *i.e.* that the Fourth Amendment "relates only to searches and seizures in connection with criminal prosecutions or enforcement of penalties" (85 U.S. App. D.C. 242, 254), and does not affect matters such as health department inspections, which are said to be other than criminal in nature, seems to have motivated the dissenting opinion in the United States Court of Appeals in *Little*, 85 U.S. App. D.C. 242, 254. An apt answer to this proposition is advanced in the comprehensive and well-reasoned majority opinion in *Little* (85 U.S. App. D.C. 242, 245-246):

> "It is said to us that the regulations sought to be enforced by this search only incidentally involved criminal charges, that their purpose is to protect the

---

[12] The Maryland court apparently accepted (and rightly so) the fact that a health "inspection" or "examination" is a "search" within the meaning of the pertinent constitutional provisions. The point is not discussed in the *Givner* opinion and appellant passes it also, except to note the statement in *Little* that (85 U.S. App. D.C. 242, 247):

> "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. 'Inspect' means to look at, and 'search' means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

public health. It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. It is said to us that therefore there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of crime, they must get a search warrant, but that if they are searching for something else or are just searching, they need not get a search warrant; for searchers of the latter sort, we are told, home owners must open their front doors upon demand of an officer without a warrant. The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

If the argument advanced by the supporters of warrantless health inspections is followed to its logical conclusion, it would seem necessary to believe that the people had no guaranty whatsoever against unreasonable invasion of their homes prior to the Fourth Amendment, but that the Amendment, for the first time, afforded them such protection, and, even then, only in limited circumstances, *i.e.*, in connection with criminal prosecutions or enforcement of penalties. The result destroys the argument. As was

pointed out by the majority in *Little* (85 U.S. App. D.C. 242, 246):

> "The argument involves a basic error in reasoning in respect to the Constitution's Bill of Rights. The Fourth Amendment did not confer a right upon the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the Amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitation thereon."

This Court has indicated that the scope of the Fourth Amendment is not limited to searches for evidence to be used in criminal prosecutions, but extends to civil matters as well (*Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298; *Harriman v. Interstate Commerce Commission*, 211 U.S. 407; *District of Columbia v. Little*, 339 U.S. 1, 3. (See the Court's statement of the constitutional contentions therein.)), as have other courts.[13]

---

[13] *Federal Trade Commission v. Tuttle*, 2 Cir., 244 F. 2d 605 (Production, under subpoena, by one neither being investigated nor proceeded against, of documents relating to matters under investigation by F.T.C.); *Federal Communications Commission v. Cohn*, D.C., S.D., N.Y. 154 F. Supp. 899 (Production, under subpoena, of material relevant to scope of broadcasting network study being made by F.C.C.); *Application of Certain Chinese Family Benevolent and District Associations*, D.C. N.D. of Calif., S.D., 19 F.R.D. 97 (Production, under subpoena, of records and documents, at request of Grand Jury. The opinion points out that, "The Government contends that all of the persons and organizations here involved have been called before the Grand Jury in the capacity of witnesses in the possession of documentary evidence necessary to the Grand Jury investigation, and *that none of the persons or organizations are suspect of criminal ac-*

The founding fathers were probably not much concerned with health code inspections when they framed the constitutional prohibition against unreasonable searches. Still, a strange anomaly arises if one therefore concludes that people as seemingly jealous of the prerogatives of personal liberty as were the founders, intended to guard themselves against searches for criminal evidence, but, at the same time, to lay open their homes and privacy to non-criminal searches, the necessity for which seems scarcely as acute as the need, in the public interest, for protection against crime. "Historically it was probably the abuses of the general warrant which led to the adoption of the Fourth Amendment, but the individualistic spirit of that age would have rebelled equally at noncriminal invasion of the home unknown in 1789 when government was simpler." 63 Harvard Law Review (1949) 350. Established constitutional principles are to be adapted to assure proper application to modern conditions of life. *McCulloch v. Maryland*, 4 Wheat. 316. The Fourth Amendment and the Due Process Clause should now be applied to invalidate searches of private homes by health officers without warrants, whether carried out in connection with "criminal" or "civil" proceedings.

Appellant, of course, contends that the intended search of his home was a search connected with a criminal prosecution. If the problem is approached on the narrow front of the operation and effect of Section 120 alone, then pro-

---

tivities which will render them subject to criminal prosecution". (19 F.R.D. 97, 99; emphasis supplied). The court also remarked that, "In any event, this power (the power of the Grand Jury to require by subpoena the production before it of documents and records relevant to its investigation) *is subject to the supervision of the Courts to see that it is not unreasonably or oppressively exercised.*" (*Id.*, words in parentheses and emphasis supplied.) The court held that, under the Fourth Amendment, the witnesses could not be required to produce the documents sought). Compare the power of the health officer under Section 120 of the Baltimore City Health Code.

ceedings for violation thereof are clearly criminal in nature (*supra*, pages 18-19). Even if the issue is appraised from a broader viewpoint of the operation and effect of the entire (appropriate portions of the) Baltimore City Health Code, the outcome is still the same. The ultimate result of the search authorized by Section 120, of which the instant case is an example, may well be a criminal prosecution for violation of any of the numerous provisions of that Code. See, particularly with respect to private dwellings, Baltimore City Code (1950) Article 12 (Pamphlet opposite R. 36), Sections 106-108 ("Nuisances and the Prevention of Disease") and Sections 112-120 ("Hygiene of Housing"). Of course there are provisions relating to notice (*e.g.*, *Id.*, Sections 107 and 112) to abate suspected nuisances (These provisions do not seem to be mandatory; they generally provide that the Commissioner of Health "*may* send a written notice" (See, *Id.*, Section 112; emphasis supplied.), but none for hearings with regard thereto, until criminal proceedings are instituted under the pertinent penalty section of the Health Code punishing the particular violation. The Baltimore City Health Code does not seem specifically to provide for re-inspections, but second inspections are, in practice, carried out. The evidence typically presented at trial of an offender for violation of that Code is to the effect that an initial inspection disclosed a violation which was found still to be present upon a second inspection,[14] despite that a notice to correct had been given and time for compliance had expired. Appellant submits that evidence (*e.g.*, the defective condition of premises) obtained in the first inspection is thus used in a criminal prosecution and that

[14] Re-inspections, of course, present a problem, even in the view taken by proponents of inspections without warrants, for such second inspections, quite clearly (in Baltimore City, at least), are designed and intended to obtain evidence of violations of the health code for use in criminal prosecutions initiated by the health enforcement agency and prosecuted by the State.

the first inspection is, to that extent at least, as much as is an investigation conducted by any police or other enforcement officer, "a search for evidence to be used in a criminal prosecution" (*Givner v. State*, 210 Md. 484, 504).

E. The Proposed Search of Appellant's Home Without a Warrant was Unreasonable and Cannot be Justified on any Ground.

Reasonbleness of the intended search of appellant's home by the health officer must be determined in accordance with the same standards including the requirements of the Fourth Amendment (if not acting directly, then through the Due Process Clause. *Wolf v. Colorado*, 338 U.S. 25), which would be applied to any other search by government officials. So tested, both the search and the ordinance which purports to permit it are fatally defective and must be stricken down.

Reasonableness of a search without a warrant is to be judged by the exigencies of the occasion. *Johnson v. United States*, 333 U.S. 10. There was not in the instant case any such extremity of circumstances as would have warranted the health officer's attempt to thrust himself into appellant's home without a warrant. There was no emergency, immediate or otherwise, unless the sanitarian's explanations that he was apparently busy[15] (R. 19), or that he "had two students (he) had to release at three o'clock" (R. 20; word in parentheses supplied), or that he had "to be in the office at three thirty every day to take care of my reports" (R. 20), or that "Rodent infestation is always an emergency" (R. 20) are to be accepted as establishing the existence of circumstances sufficiently compelling to warrant dispensing with the necessity for a search warrant.

[15] "I was under the impression it was a vacant dwelling. I was snowed under in work" (R. 20).

The sanitarian had ample time to apply for a warrant if he chose to do so. The nature of the nuisance which he claimed to suspect was not such that it might be removed from his jurisdiction before he could return with a proper warrant. And in fact he returned to appellant's house on the day after his demand for entry (R. 21) and again a week later (R. 8) to compile evidence for use at trial (R. 8). Surely his examination of the house could just as well have been made on either of the two occasions, or at any other time, and with a proper warrant. The sanitarian simply chose to ignore these opportunities. He chose to insist on his supposed authority under the ordinance arbitrarily to demand entry without a warrant, despite that appellant informed him he could get in the house with a warrant (R. 19).

His conduct in itself exemplifies part of the danger inherent in allowing an enforcement officer to be himself the judge of the necessity for, and the time and place when, he shall intrude upon the privacy of a home. Reasonableness, except in the most urgent situations, is to be determined not by an enforcement, but by a judicial officer. *Johnson v. United States*, 333 U.S. 10. There is certainly no lack of opinion in this Court condemning invasion of private dwellings without the intervention of a magistrate or other judicial officer. *Agnello v. United States*, 269 U.S. 20; *Harris v. United States*, 331 U.S. 145; *Davis v. United States*, 328 U.S. 582; *Johnson v. United States*, 333 U.S. 10; *McDonald v. United States*, 335 U.S. 451; *Wolf v. Colorado*, 338 U.S. 25; *Miller v. United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L. ed. 2d 1332; *Jones v. United States*, 357 U.S. 493, 78 S. Ct. 1253, 2 L. ed. 2d 1514.

And, of course, warrants are to be granted by the judicial officer, and searches permitted, only upon probable cause, not mere suspicion. *Johnson v. United States*, 333 U.S. 10. That the ordinance in the instant case not only permits the

enforcement officer to determine the necessity for search, but authorizes him to do so upon suspicion alone, should in itself insure its demise.

Protection of the public health is a function no more vital than securing the public safety against crime. Extermination of rats ("rodents" (R. 16)) is of no greater public importance than punishment of murderers, embezzlers, panderers, gangsters, gunmen or racketeers. Protection of the public health would seem to necessitate no greater infringement of the individual's privacy than protection against crime.

Fire prevention laws are as important, as much in the public interest and as much a part of the police power as are health laws. Yet, interestingly enough, "the authority to inspect conferred under the Fire Prevention Code . . . (of Baltimore City) expressly excepts inspections of private residences" (*Givner v. State*, 210 Md. 484, 490; words in parentheses supplied).

Control of rodents is no more essential than control of contagious or infectious diseases, such as, *e.g.*, smallpox or cholera or typhoid fever,[16] yet the Baltimore City Health Code itself provides that, "Whenever the Commissioner of Health may have just cause to suspect that any baggage, clothing, bedding or goods of any character, found in the city, are infected with any contagious or infectious diseases, which may be dangerous to the public health, *he shall proceed to the nearest magistrate, and obtain a warrant*, and have said goods removed . . ." (Section 208; page 82 (fol. 132) of pamphlet opposite R. 36; emphasis supplied).[17]

---

[16] For a more exhaustive list, see Baltimore City Code, Article 12, Section 197 ("Reportable Diseases") (Page 79 (fol. 129) of pamphlet opposite R. 36).

[17] The suggestion that there is doubt whether a search warrant is obtainable to conduct a search under health codes, which, admittedly

It is said that searches under Section 120 of the Baltimore City Health Code are reasonable, in part because they "are to be made at reasonable hours", i.e. in the day time. *Givner v. State*, 210 Md. 484, 508. It is of interest in that connection to note that certain of the general warrants so heinous to our forefathers would also be reasonable if judged by that standard, since they too were reserved for use in the day time only![18] This feature apparently failed to make them any more palatable.

Instances are pointed out of "reasonable inspection laws" relating to pawnbrokers, food dealers, inns, hotels and institutions.[19] But hotels, for instance, "are subject to government license, but no one has ever suggested that in this country a man could be required to have a license to have a home" (*District of Columbia v. Little*, 85 U.S. D.C. 242, 249).

2. APPELLANT SEEKS NOTHING MORE THAN SIMPLE PROCEDURAL DUE PROCESS. THE CONSTITUTIONAL GUARANTIES UPON WHICH HE RELIES ASSURE HIM THAT MINIMAL PROTECTION.

Appellant does not in this cause attack the substantive validity of the Baltimore City Health Code, or the necessity for concomitant enforcement procedures. Nor does he

---

"of itself would not prove that a search warrant is unnecessary" (*Givner v. State*, 210 Md. 484, 503; *District of Columbia v. Little*, 85 U.S. App. 242), would seem to be based on misconception. And, in any event, remedial legislation can be implemented, if needed.

[18] Tudor, *The Life of James Otis* (1823) 78, 79 refers to a "statute of the 13th and 14th of Charles the second" which provided, in part "that, 'it shall be lawful to or for, any person or persons, authorized by *writ of assistance under the seal of his majesty's Court of Exchequer*, to take a constable, headborough, or other public officer, inhabiting near unto the place, and *in the day time* to enter, and go into any house, shop, cellar, warehouse, or room, or other place, . . .'" (The first italics above are in the text cited; the second italics are supplied. Compare Baltimore City Code, Article 12, Section 120).

[19] See page 5 of appellee's "Motion to Affirm", filed herein.

contend that the municipality lacks the power properly to provide for protection of the health of its residents.

He urges only that the due process of law secured to him by the federal constitution not be jettisoned along the way to accomplishment of that most salutary end. He objects to the means sought to be used against him. He seeks nothing more than procedural due process. This the ordinance (Section 120) denies him. It is hence invalid. The lower court erred in failing to recognize this invalidity, in refusing to grant appellant's several motions seeking to resolve the issues in his favor on constitutional grounds and in its verdict. If in fact probable cause exists to presume a nuisance in his house, a warrant can so easily be obtained from a magistrate and a lawful search conducted that no valid reason appears why the business of the Baltimore City Health Department should not be conducted without encroaching on the liberties of the residents of that City. Appellant submits that an "appropriate balancing . . . of the liberty of the (people) and the convenience of the (health officers)"[20] requires no less.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

BENJAMIN LIPSITZ,
Counsel for Appellant

---

[20] Words in parentheses are supplied. The reference is to the remarks of Lord Simonds in *Christie v. Leachinsky*, 1 All E.R. 567, 576, as quoted in the dissent of Mr. Justice Frankfurter in *Harris v. United States*, 331 U.S. 145, 170, in regard to the problem of "the appropriate balancing, in the words of Lord Simonds, of 'the liberty of the subject and the convenience of the police' ".